IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2121 OF 2006

Shri Shyam Subhash Sawant
Aged 22 years,
R/o. Premnagar, near Saibaba
Temple, Unnat Nagar Road,
Goregaon (W),
Mumbai 400 060 .. Petitioner.

Vs.

1. Shri A.N.Roy
Commissioner of Police,
Brihanmumbai ..
2. The Superintendent
Thane Central Prison,
Thane ..
3. The Superintendent
Nasik Road Central Prison,
Nasik ..
4. The Senior Inspector
of Police, Goregaon
police station, Goregaon,
Mumbai ..
5. The State of Maharashtra .. Respondents.

Mr.S.V.Kotwal for the petitioner.
Mr.D.S.Mhaispurkar APP for the respondent.

CORAM : SMT.RANJANA DESAI &
D.B.BHOSALE, JJ.

DATED : 20TH JUNE, 2007.

JUDGMENT: (PER SMT.RANJANA DESAI, J.)

1. The petitioner is detained by the Commissioner of Police, Brihan Mumbai under the order of detention dated 2.5.2006 issued under the provisions of Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug Offenders

and Dangerous Persons Act, 1981 ("the said Act" for short) with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. The order of detention, grounds of detention and the material in support thereof were served on the petitioner on 10.7.2006. In this petition, the petitioner has challenged the said order of detention.

2. The order of detention is based on two cases being C.R.No.161/2006 registered under sections 452, 427, 504, 506, 323 read with 34 of the Indian Penal Code and C.R. No.169/2006 under sections 353, 506(2), 504 of Indian Penal Code registered at Goregaon police station and two in-camera statements of witnesses "A" and "B". On the basis of this material the detaining authority was satisfied that the petitioner was acting in a manner prejudicial to the maintenance of public order. The detaining authority was further satisfied that the petitioner has created a reign of terror in the concerned localities and in view of his tendencies and inclination reflected in the offences committed by him it was necessary to detain him under the said Act.

3. We have heard at considerable length

Mr.Kotwal, learned counsel appearing for the petitioner. Mr.Kotwal submitted that in the affidavit filed by the detaining authority, the detaining authority has stated that in the past punitive action was taken against the petitioner, however, the said action was not sufficient to curb his activities and, therefore, it was necessary to preventively detain him. Mr.Kotwal contended that this averment made in the affidavit shows utter non application of mind on the part of detaining authority. Mr.Kotwal submitted that in the grounds of detention there is reference to only two cases registered against the petitioner. There is nothing to indicate that the petitioner was convicted in any case. Mr.Kotwal drew out attention to the judgment of the Supreme Court in **Haradhan Saha Vs. The State of West Bengal and Others 1975 (3) Supreme Court Cases 198** and submitted that there is a difference between punitive action and preventive detention. He submitted that in punitive action a person is punished whereas in preventive detention he is prevented from indulging in prejudicial activities. The learned counsel contended that in the cases to which reference is made in grounds of detention the petitioner is not convicted. He submitted that mere intention to get the petitioner convicted is not enough. He pointed out that witnesses ‘A’ and ‘B’

refer to incidents which allegedly took place prior to the incidents in connection with which cases are registered against the petitioner. The learned counsel submitted that assertion made in the affidavit that punitive action was taken against the petitioner and that was not sufficient to curb his activities is baseless. The learned counsel urged that non application of mind exhibited by the detaining authority in the affidavit has rendered the detention order illegal. In support of this submission Mr.Kotwal also relied on the unreported judgment of this Court in **Jiteshkumar @ Jitesh @ Tony Ghanshyam Ghug Vs. The Commissioner of Police & ors**. delievered on 8-3-2007 in Criminal writ petition no. 1480 of 2006.

4. Mr.Mhaispurkar, learned A.P.P. on the other hand submitted that the word "punitive" action is used in common parlance. He submitted that if the averments on which reliance is placed by Mr.Kotwal are read in the context of the other averments made in the affidavit it will be clear that there is no non application of mind.

5. The averment about which grievance is made reads thus:

. "It is stated that in the past

> punitive action was taken against the detenu, however, the said action was not sufficient to curb the activities of the detenu, hence, to prevent the detenu from acting in similar prejudicial activities in future, it was necessary to preventively detain him."

. The word "punitive" has been defined in Black's law dictionary as involving or inflicting punishment. It is a fact that cases which may involve punishment are registered against the petitioner and reference to those cases is made in the grounds of detention. The detaining authority has further averred in the affidavit that action taken against the petitioner under normal law of land was found to be insufficient and ineffective to deter him from indulging in criminal activities prejudicial to the maintenance of the public order hence the order of detention was issued against him to curb his activities which affected maintenance of the public order. If the averment quoted above is read with this assertion it is absolutely clear that by the words "past punitive action" the detaining authority is referring to action taken against the detenue under normal law of land which may involve punishment. Therefore, we are unable to accept Mr.Kotwal's statement that there is non application of mind on the part of detaining authority.

6. In our opinion, reliance placed by Mr.Kotwal

on **Haradhan Saha's** case is misplaced. In that case the Supreme Court was considering the concept of preventive detention as distinguished from criminal prosecution. The Supreme Court observed that the essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it and its basis is the satisfaction of the detaining authority of a reasonable possibility of the likelihood of the detenue acting in a manner similar to his past acts and preventing him by detention from doing the same. The Supreme Court then observed that criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. The Supreme Court made it clear that there is no parallel between prosecution in a court of law and a detention order under the preventive detention Act. The Supreme Court further clarified that one is a punitive action and the other is a preventive act and in one case a person is punished on proof of guilt and the standard is proof beyond reasonable doubt whereas in preventive detention a man is prevented from doing something which it is necessary for the reasons mentioned under the relevant provision of the preventive detention Act to prevent. Thus, it was made clear that prosecution in a Court of law is a punitive action

where a person can be punished. The cases registered against the petitioner can lead to his prosecution in a Court of law where he can be punished if the prosecution proves its case beyond reasonable doubt. Thus, even if the averment quoted above is read in the context of the observations of the Supreme Court in **Haradhan Saha's** case one cannot attribute non application of mind to the detaining authority.

7. We are also of the opinion that the petitioner cannot draw any support from the judgment of this Court in **Jiteshkumar's** case (supra). In that case the detaining authority had asserted in the affidavit that material placed before him included incamera statements when in fact no incamera statements were placed before him. That was therefore a gross case of utter non-application of mind. That judgement will have to be confined to its own peculiar facts. It cannot be applied to the present case.

8. It is true that witnesses 'A' & 'B' have referred to the incidents which had taken place prior to the incidents in connection with which cases are registered against the petitioner. But the statements of these witnesses are recorded after the registeration of the said cases on a condition of

anonymity and in those statements apart from the incidents which had taken place in February 2006, the witnesses have also stated that the petitioner and his associates regularly indulge in various crimes such as extortion, robbery etc and they have created a reign of terror. Hence, the detaining authority was justified in saying that action taken under the normal law of the land was found to be insufficient to deter the petitioner from indulging in similar prejudicial activities in future. We are, therefore, unable to come to a conclusion that the order of detention suffers from the vice of non-application of mind.

9. Mr.Kotwal then urged that the detention order dt. 2-5-2006 was served on the petitioner on 10-7-2006. Thus, there is delay in executing the detention order and this delay has snapped the live link between the alleged prejudicial activities of the petitioner and the need to preventively detain him. He submitted that therefore the detention order must be set aside.

10. We find no substance in this submission. Time taken to execute the detention order is explained by Prakash Sawant, PSI attached to the Externment Branch of the Goregaon Police Station at

the relevant time. Shri Sawant has given the dates on which efforts were made to serve the detention order on the petitioner. He has stated that various places were visited by the police but the petitioner was not traceable. We are satisfied with the explanation offered by Mr. Sawant. We are of the opinion that the petitioner was evading detention. His recalcitrant conduct disentitles him from urging that live link was snapped. In fact his conduct in our opinion strengthens the detaining authority's apprehension that unless preventively detained the detenue would continue to indulge in prejudicial activities. We, therefore, reject this submission of Mr.Kotwal.

11. Connected with the above submission of Mr.Kotwal is his further submission that the State Government has mechanically approved the order of detention because the detention order indicates that the Senior PI of Goregaon Police station was to execute the detention order and submit his compliance report, however, there is no reference to any such execution or compliance report in the order passed by the Government approving the order of detention. The State Government was, therefore, not aware that the detention order was not executed and yet it approved the detention order. Mr.Kotwal submitted that this

contention has not even been replied to by the State Government.

12. We reiterate that the petitioner's conduct does not entitle him to raise this contention. The detention order could not be served till 10-7-2006 because he was absconding. We have already recorded our approval of the explanation offered by PSI Sawant. If the petitioner chose to evade arrest he cannot turn round and say that because the fact that he was absconding and hence detention order was not served on him was not conveyed to the State Government, approval order of the State Government must be set aside. The petitioner cannot be allowed to frustrate the detention order on such ground. The fact that detention order could not be served on the petitioner because he was absconding provides an additional ground for approval of detention order. We, therefore, reject this submission.

13. Mr.Kotwal then submitted that the recording of incamera statements itself is doubtful as there was no occasion to conduct further enquiry against the petitioner when he was already released on bail in the registered offence. Having perused the incamera statements we are unable to hold that they are doubtful merely because they were recorded after the petitioner was released on bail. The petitioner

has not given any acceptable reasons why the statements can be called doubtful. The detaining authority has stated that confidential enquiry revealed that nobody was willing to complain against the petitioner out of fear of retaliation and only on condition of anonymity the statements of witnesses could be recorded. In our opinion no case is made out by the petitioner to persuade us to doubt this statement of the detaining authority. We reject this submission.

14. Mr.Kotwal then contended that the petitioner was not communicated the approval and confirmation orders and, therefore, detention order is vitiated. He submitted that these orders should have been supplied in Marathi which is the language known to the petitioner. He submitted that on this ground the detention order must be set aside. In support of his submission Mr.Kotwal relied on judgment of the Supreme Court in **Deb Sadhan Roy vs. State of West Bengal (1972) 1 SCC 308**.

15. In his affidavit the detaining authority has stated that the petitioner has been communicated the order of detention, committal order, compilation of documents alongwith their Marathi translation. It is specifically stated that confirmation order has been

also served on the petitioner. In view of this we find no force in this submissions. We must, however, refer to the Supreme Court's judgment in **Deb Sadhan Roy** to which reference is made by Mr.Kotwal. In our opinion this judgment does not help the petitioner at all. In this case the Supreme Court was inter alia considering what would be the effect of non communication of confirmation order. No doubt the Supreme Court quoted with aproval its judgment in **Biren Dutta & Others vs. Chief Commissioner of Tripura AIR 1965 SC 596** where it is observed that it is desirable and it would be fair and just that confirmation order should be communicated in every case to the detenu. But the Supreme Court further clarified that the effect of non-communication, however, may be an irregularity which does not make the detention otherwise legal, illegal. We may also refer to the judgment of this Court in **Shri Rajendra Prasad Gupta @ Munnabhai @ Rajubhai Surajlal Gupta vs. Shri R.S. Sharma & Ors. 2004 ALL MR (Cri) 2356** where after referring to the Supreme Court's judgment in **Deb Sadhan Roy's** case this Court has reiterated the same view. In view of this clear position of law, Mr.Kotwal's submission that non-communication of confirmation order is fatal to the detention order cannot be accepted. In our opinion by analogy even non-communication of approval order is a mere

irregularity and it will not render otherwise legal detention, illegal. This submission of Mr.Kotwal is, therefore, rejected.

16. Lastly, Mr.Kotwal submitted that under section 3(2) of the said Act the Commissioner of Police has power to pass detention order for twelve days in emergent situations. This section does not empower the State to delegate the power to detain a person at a particular place to the Commissioner of Police. Mr.Kotwal further submitted that jurisdiction of the Commissioner of Police is limited to only commissionerate area. Therefore he could not have passed the committal order directing that the petitioner be detained first at Thane and then at Nasik Road Central Prison. Mr.Kotwal submitted that the State Government only approves the detention order but it does not approve the committal order. Mr.Kotwal submitted that under section 5(a) of the said Act it is the State Government who has to by a general or special order specify the place where a person is to be detained and the conditions under which he is to be detained. Hence the committal order issued by the Commissioner of Police, Mumbai cannot be sustained. Mr.Kotwal contended that consequently the petitioner’s detention becomes illegal.

17. Mr.Mhaispurkar, the learned A.P.P. contended that section 3(2) of the said Act delegates to the Commissioner of Police power of the State Government to detain a person. This delegation also includes power to decide the place where a person should be detained. Mr.Mhaispurkar submitted that any other view will frustrate the power to detain. Mr.Mhaispurkar contended that power under section 3(2) is subject to approval under section 3(3) and when detention order is approved under section 3(3) even place of detention is approved. Mr.Mhaispurkar submitted that therefore the detention of the petitioner cannot be held to be illegal on this ground.

18. In our opinion last submission of Mr.Kotwal is also liable to be rejected. State Government's power to issue detention order is found in section 3(1) of the said Act. Under section 3(2) the State Government can delegate it to the Commissioner of Police for a period not exceeding three months at a time. Under section 3(3) the detention order shall remain in force only for twelve days unless in the meantime it has been approved by the State Government.

19. In this case the order of detention states that it is issued by the Commissioner of Police in exercise of powers conferred by section 3(2) of the said Act and Government Order, Home Department (Special) dated 28.3.2006. The order dated 28.3.2006 delegates to the Commissioner the power of the State Government conferred by section 3(1).

20. At this stage it is necessary to refer to section 5 of the said Act. Under section 5(a) every person in respect of whom a detention order has been made shall be liable to be detained in such place and under such conditions as the State Government may by general or special order, specify. It is pertinent to note that in exercise of powers conferred by clause (a) of section 5 of the said Act, the Government has made the order called the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers and Drug Offenders (Conditions of Detention) Order, 1981 ("the said order" for convenience). Section 4 thereof provides for place of detention. It states that a detenue shall be detained in a jail or sub-jail or a police lock-up, as the case may be. As per the mandate of section 5(a) the said order is made by the Government and the person against whom detention order is issued has to be detained at the place which could be any jail or

sub-jail or a police lock up as the case may be. The power to issue detention order would take within its ambit power to lodge a person in a particular jail. Therefore if power to issue detention order is delegated power to lodge a person in a particular jail would also be covered by that delegation. This is borne out by the fact that in the committal order the Commissioner of Police has stated that the detention order is issued in exercise of powers under section 3(2) of the said Act read with Government order dated 28.3.06 under which power of the State Government under section 3(1) is delegated to him and he has further stated that he has directed that the petitioner be initially detained in Thane Central Prison, Thane and thereafter in Nashik Road Central Prison, Nashik under the conditions laid down under the said order. In view of this we unhesitantly reject Mr.Kotwal's last submission that the committal order is bad in law and hence the detention of the petition is illegal.

21. In the ultimate analysis we find that there is no infirmity in the impugned order of detention. It is perfectly legal and justified. In the circumstances the petition is dismissed.

(SMT.RANJANA DESAI, J.)

(D.B.BHOSALE, J.)